II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

i. General Issues

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

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[1]"Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

Congress of the United States
Washington, DC 20515

April 15, 2010

Via Hand Delivery

The Honorable Claire McCaskill
Chairman, Senate Impeachment Trial Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Impeachment Trial Committee
United States Senate
Washington, D.C.

c/o Morgan Frankel
Senate Legal Counsel

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

In light of the matters raised at the organizational meeting of the Senate Trial Committee on April 13, 2010, the Managers for the House request that a meeting be held with Senator McCaskill, Senator Hatch, and counsel for Judge Porteous at the earliest opportunity to discuss various issues regarding the pre-trial phase of the proceedings and other scheduling matters. The Managers who would attend that meeting would include, at a minimum, Mr. Schiff and Mr. Goodlatte (who were the Chairman and Ranking Member, respectively, of the House Impeachment Task Force). Topics might include the following:

- When dispositive motions should be filed and the related briefing and argument schedules;
- When requests for stipulations of fact and authenticity of documents should be filed;
- When witness lists should be filed;
- When the parties should specify which documents they intend to introduce in their case in chief;

- Setting a firm trial date, in light of the need to make arrangements for out-of-town witnesses.

This list is not intended to be exhaustive, but simply a starting point for discussion. We believe it is in everyone's best interest to address these and other issues as soon as possible so the schedule does not get away from us in the months ahead.

We look forward to hearing from you at your earliest convenience.

Respectively,

Adam Schiff, Manager

Bob Goodlatte, Manager

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

cc: Morgan Frankel, Esq.
Richard Westling, Esq.

IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

MOTION OF JUDGE G. THOMAS PORTEOUS, JR. FOR DISCOVERY FROM THE HOUSE MANANGERS

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and moves the Senate of the United States, through the Senate Impeachment Trial Committee, for an order granting his motion seeking discovery from the House Managers. In support of his motion Judge Porteous states as follows:

1. Introduction and Procedural Background

From a discovery perspective, this case is unlike any impeachment trial that has taken place under Senate Rule XI. In each of the three prior cases involving a Rule XI committee, the House of Representatives returned Articles of Impeachment against a district judge after that judge had been indicted and tried at a criminal jury trial. Those trials were conducted pursuant to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. As a result, in those cases, by the time the issue of discovery arose before the Senate Impeachment Trial Committee, the parties had developed a

record at a federal criminal trial and had been involved in extensive discovery prior to the return of the Articles of Impeachment. Thus, before appearing before the Senate Impeachment Trial Committee each of these judges had the opportunity to cross-examine the government's witnesses, inquire in to the validity of documents presented as evidence against them, and call witnesses on his own behalf.

In contrast, while discovery has commenced in this proceeding, prior to his impeachment Judge Porteous was provided with only minimal information regarding the government's case against him. Judge Porteous was the subject of a multi-year grand jury investigation in which he had no discovery rights. Later, a Special Committee of the Judicial Conference of the Fifth Circuit held an adversarial proceeding at which Judge Porteous was forced to proceed without counsel. While some discovery was provided to Judge Porteous, it was limited to those materials that investigatory counsel chose to provide. During the House Impeachment Task Force hearings, Judge Porteous was invited to participate, through counsel, in the hearings. However, only a handful of witnesses testified at those hearings and Judge Porteous' counsel was only permitted a very limited time for cross-examination. Moreover, minimal documentary discovery was provided before the hearings and, in many cases, witnesses were examined based upon documents which had not been provided to Judge Porteous' counsel prior to the hearings.

On March 23, 2010, the House Managers provided respondent with a compact disk containing a number of exhibits, totaling approximately 9,702 pages. This compilation of documents amounted to all of the exhibits referenced in the House Judiciary Committee's Report to the House of Representatives on the Articles of

Impeachment against Judge Porteous. Significantly, this compilation was not assembled with Judge Porteous' discovery rights in mind, but instead amounted to taking those materials that supported to the Impeachment Report and providing them to Judge Porteous. To date, it remains unclear what other efforts were made to search the House Judiciary Committee's files to determine whether other information should be provided at the time of this original production.

The March 23 production was carefully reviewed by respondent's counsel. Based upon this review, a letter was sent to the House Managers counsel on May 6, 2010 detailing a number of items that were either incomplete or that had been redacted. See Letter from Richard Westling to House Impeachment Counsel, dated May 6, 2010. (Exhibit 1). The May 6 letter sought production of these documents in complete and unredacted form. Additionally, the May 6 letter sought production of two other categories of documents: (1) other documents and information gathered by the Task Force as part of its impeachment inquiry; and (2) any deposition transcripts that had not been produced, a list of all witnesses interviewed, and any notes or memoranda of those interviews.

In a May 11, 2010 letter, the House Mangers' Counsel responded that they would make the previously incomplete and redacted materials available in complete and unredacted form (to the extent the redactions were not on the documents when they received them) and refused the other two requests. The letter began with a statement of principles:

> As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

See Letter from Alan Baron to Richard Westling, dated May 11, 2010 (Attached as Exhibit 2).

On May 20, 2010, following up on the House Managers' offer to review the incomplete and redacted materials, respondent's counsel reviewed and requested copies of the previously incomplete and redacted material. These copies were provided on May 21, 2010. Also on May 20, 2010, counsel for the House Managers informed respondent that additional discovery material would be forthcoming and, on May 26, 2010, these materials were viewed by respondent's counsel and certain copies were requested. Also on May 26, counsel for the House Managers informed respondent's counsel that additional discovery materials would be made available some time in the near future. The House Managers did not specify an exact date and have not contacted us in the last two days to inform us that additional discovery materials are ready for review. While this is a detailed recitation of the discovery events that have taken place to date, it is

important for the Committee to understand the discovery process is still on-going and it is far from complete. While respondent's counsel made clear at the conference held on May 18, 2010 in Vice Chairman Hatch's Office that we would do everything we could to adhere to the proposed schedule of pretrial proceedings and evidentiary hearings, that representation was made based on a belief that the House Managers would provide us with all their discovery materials expeditiously and in advance of the dates on which witnesses must be designated and other critical decisions made. Respondent's counsel are, frankly, concerned that the pace of discovery is not keeping up with the pace required by the schedule as currently established in the Committee's scheduling order.

2. Applicable Law and Senate Precedent

An individual's right to a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment has long been held to trigger serious concerns when the government refuses to disclose information or provide discovery. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). While the rules in these criminal cases may have limited application in the impeachment trial context, the Due Process Clause clearly applies and supports Judge Porteous' right to discovery. Moreover, based upon Senate precedent, the House Impeachment Counsel's cramped reading of the House Manager's discovery obligations is unsupported and Judge Porteous is entitled to far more substantial discovery than the House Managers have provided to date.

In the Hastings impeachment trial process a discovery dispute similar to the one here was addressed to the Senate Impeachment Trial Committee. Judge Hastings sought

very broad discovery akin to what would be normal in a civil case, while the House Managers took the position that the rules of criminal discovery should set the outer limits of the House's discovery obligations. The Senate Impeachment Trial Committee resolved the dispute in an order, part of which stated:

> (c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House – for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings – to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them.

See Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Hrg. 101-194, Pt. 1, at 285-86.

Significantly, this prior precedent is contrary to the limited approach to discovery advocated by the House Managers in Judge Porteous' case. The Hastings Impeachment Trial Committee expressly stated that the interests of the impeachment trial process "will be served best by the fullest disclosure possible." The House Managers in this case have clearly not embraced this position.

Judge Porteous suggests that in light of this precedent the specific discovery requests set out in Section 3 below are appropriate. Additionally, Judge Porteous notes that in the Hastings impeachment trial the House Managers provided Judge Hastings with a list of all information gathered during the impeachment inquiry and identified what information had been supplied to Judge Hastings and what had been withheld. To date, the House Managers in this case have refused to provide this information to Judge Porteous. Unfortunately, this approach not only conflicts with precedent, but also has the potential to delay these proceedings because Judge Porteous is not in a position to determine whether he has all the relevant information in the House Managers' possession or whether he will be required to seek discovery directly from governmental sources such as the Department of Justice and the Federal Bureau of Investigation.

3. <u>Specific Discovery Requests</u>

1. All information gathered by the House Impeachment Task Force (the "Task Force") in connection with its impeachment inquiry from any source, including, but not limited to, the following:

    a. All documents and information of any kind received by the Task Force from the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit, the Fifth Circuit Special Investigating Committee, Chief Judge Edith Jones or other members of the Judicial Council or Special Investigating Committee, or from Counsel to the Judicial Council or

Special Investigating Committee in connection with the referral of Judge Porteous to the Judicial Council by the U.S. Department of Justice or otherwise relating to the Articles of Impeachment returned against Judge Porteous;

b. All documents and information of any kind received by the Task Force from the Judicial Conference of the United States or the Administrative Office of the United States Courts relating to complaint and discipline order entered by the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit and considered by the Judicial Conference prior to the certification to the Speaker of the House of Representatives or otherwise relating to the Articles of Impeachment returned against Judge Porteous;

c. All documents and information of any kind received by the Task Force from the U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) including, but not limited to, the following:

    i. All books, papers, records, reports, memoranda or any other document relating to the investigation of Judge Porteous or any matter relating to the Articles of Impeachment returned against Judge Porteous;

    ii. All memoranda of witness interviews, rough notes of witness interviews; and FBI Forms 302 relating to the investigation of Judge Porteous or any matter relating to the Articles of Impeachment returned against Judge Porteous;

    iii. All books, papers, records, reports, memoranda or any other document relating to the DOJ's decision to decline prosecution of Judge Porteous;

    iv. All books, papers, records, reports, memoranda or any other document relating to the DOJ's referral of the Judge Porteous to the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit;

d. All documents and information of any kind received by the Task Force as a result of the Grand Jury and Wiretap Disclosure Orders entered by the U.S. District Court for the Eastern District of Louisiana, or any other court, based upon motions filed by the House Judiciary Committee; and

e. All documents and information of any kind received by the Task Force from any other source whether governmental, a third party record holder or a witness relating to the Articles of Impeachment returned against Judge Porteous;

2. A list of all the witnesses interviewed during the Task Force inquiry by any individual representing or working with the Task Force;

3. All memoranda, notes or other writings prepared or kept by any individual representing or working with the Task Force including, but not limited to, FBI Special Agent DeWayne Horner, during witness interviews. In particular, Judge Porteous is seeking any notes prepared or kept by any individual during that portion of any interview that was not made part of the formal deposition;

4. All information that in any way reflects upon the character, credibility or believability of any witness interviewed by, or who may be called to testify by, the House Managers including, but not limited to, information that reflects promises made to witnesses, consideration for witness testimony, instances of past misconduct by a witness, criminal record information, and any other information that could be used to impeach a witness on any grounds;

5. All books, papers, documents, photographs, or other tangible objects, or copies thereof, which the House Managers intend to use as evidence in their case in chief at trial or which are material to the preparation of Judge Porteous' defense or which were obtained from, directly or indirectly, or which belong to Judge Porteous;

6. All documents and other materials which contain information that is exculpatory in nature or otherwise favorable to Judge Porteous or that may lead to material or information that is exculpatory or favorable to Judge Porteous.

7. To the extent that the House Managers are unwilling to produce any part of the information requested in Items 1-6 and their various subparts, Judge Porteous asks that the House Managers prepare and provide an index identifying all of the information the House received during its inquiry and identifying the information that the House Managers refuse to produce, the source of that information and the grounds for their refusal to produce the information.

4. Conclusion

Based upon the foregoing, Judge Porteous respectfully asks that the Senate of the United States, through its Impeachment Trial Committee, to apply its precedent providing for broad disclosure in the context of impeachment trials, to grant his motion for discovery, and to order the House Managers to produce copies of the requested materials as soon as possible.

Respectfully submitted,

Richard W. Westling
Chelsea S. Rice
Jackson B. Boyd
Anthony J. Burba
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Counsel for G. Thomas Porteous, Jr.,
United States District Judge for the Eastern District of Louisiana

Submitted: May 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

Alan Baron - abaron@seyfarth.com

Mark Dubester - Mark.Dubester@mail.house.gov

Harold Damelin - Harold.Damelin@mail.house.gov

Kirsten Konar - kkonar@seyfarth.com

Jessica Klein, Clerk - Jessica.Klein@mail.house.gov

Richard W. Westling

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May 6, 2010

By Electronic and Regular Mail

Alan I. Baron, Esquire
Mark Dubester, Esquire
Harold Damelin, Esquire
Special Impeachment Counsel
Congress of the United States
Washington, D.C. 200515

Re: Impeachment of Judge G. Thomas Porteous – Discovery

Dear Messrs. Baron, Dubester and Damelin:

I am writing to address your March 23, 2010 document production on behalf of the House Managers ("Managers"). After reviewing the 9,702 pages of discovery materials included in that production we have the following general comments and additional requests.

First, we note that a number of the Exhibits appear to be excerpts from larger collections of documents that were produced to the House Judiciary Committee by the original source of the documents. In some cases it appears that the Managers are withholding a portion of the materials received during the course of the Committee investigation. We are requesting that the Mangers produce these document collections in their entirety. In the event that the Managers are unwilling to produce this material, we ask that you provide us with a log of all material being withheld and the basis for the Managers' refusal to make this information available to Judge Porteous and his counsel.

Second, we note that among the documents produced there are a substantial number of pages containing redacted information. The documents have been redacted using both white and black redactions to obscure certain text. We ask that you produce the documents in un-redacted form and that, to the extent that the redactions were applied to the document by the original source, you identify those documents, their source, and the redactions that were present when the documents were received by the Task Force. This will allow us to pursue un-redacted documents from their original source when necessary.

Exhibit 1

OBER | KALER
A Professional Corporation

Alan I. Baron, Esquire
Mark Dubester, Esquire
Harold Damelin, Esquire
May 6, 2010
Page - 2

Third, it is clear that the Managers have not produced all of the information gathered during the course of the Committee investigation. To the extent that documents were received by the House that are not on the Exhibit List and have not been made available for our inspection at your offices, we ask that you identify those documents, their sources, and the reasons they have been withheld. While we believe that we are entitled to all of the material that the Committee reviewed as part of the investigation of Judge Porteous, we recognize that the Managers likely take a different position. We ask that you provide this information so we can determine whether to seek a ruling from the Senate Impeachment Trial Committee regarding production of this information or independently seek the documents from third parties.

To assist you in responding to our requests we are enclosing a table detailing the Exhibits that we believe are incomplete either due to the non-production of documents or to redaction of specific pages. Looking solely at the exhibit list we are unable to determine if all of the transcripts of the depositions taken during the Committee's investigation have been produced. To the extent that certain deposition transcripts were not identified as exhibits and have not been produced to date, we are seeking their production. Further, we understand that in many cases interviews took place with various witnesses in advance of their depositions. By this letter we are requesting a list of all of the witnesses interviewed during the Committee's investigation and any notes or memoranda of those interviews. We are seeking this information both for interviews that were not followed by a formal deposition and from interviews that took place as a precursor to a deposition.

We are continuing to evaluate your requests for stipulations and anticipate providing you with a preliminary response to your request shortly. Please let me know if you have any questions. With best regards, I remain,

Sincerely,

Richard W. Westling

RWW/nr

168709

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
69b	PORT000000224 to PORT000000532	Department of Justice Document Production Two (excerpts) June 25, 2009 **309 pages**	Bates No. and CO from Ronald Welch indicates there are 309 pages of documents but the PDF contains only 85 pages. CO indicated the following is included: SF 86, FBI 302 reports in connection with background investigation, and other related documents. - 6/23/94 – Redacted Memo to Chief, Background Investigations, from Staff Assistant requesting background check on Porteous; - 6/24/94 – Redacted Memo from Director of FBI to SACs New Orleans re: instructions for background check – 5 pgs; - 6/30/94 – redacted request for Elsur Index; - 6/24/94 – redacted request for credit check; - Credit Bureau Report; - 7/15/94 – Redacted Notice of Personnel Investigations, Notice of Investigation complete – No SII record for SSN; - – Table of contents of this package indicates there are more than 151 pages to this report. - Table of Content from investigation: - Interview of Candidate....4 - - 7/8/94 – Redacted - Interview with supplement to standard form SF-86; Re-	309	85 w/ cover letter

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
			interview of Porteous – 2 on 8/18/94 – Redacted (Black) 3 pgs. - 8/1/94 – WHITE redactions - Rhonda Danos – 1 pg - 7/5/94 WHITE redactions - Don Gardner -- 2 pgs - 8/1/94 WHITE & BLACK redaction - Louis Marcotte – 2pgs - Associate Attorneys ..... 66 – 1 8/1/94 – WHITE redactions - Robert Creely – 2 pgs - 8/19/94 Memo 6-174 – To Richard Hildreth from Redacted – General Background Investigation Unit – signed by Supervisory PSS. - 8/19/94 NOTE TO DOJ – Redacted (Black) Indicates partial investigations were furnished on 7/29/94 and 8/8/94 the rest is redacted. - 7/28/94 – Redacted – NOTE to DOJ re: Porteous background investigation is incomplete. PORT459		
69c	PORT00000533 To PORT00000750	Department of Justice Document Production Three (excerpts) July 2009 **52 pages**	- Cover letter indicates 52 pgs; - 6/23/93 - JP Sheriff's Office Inter-Office Memo – all names redacted except Marcotte and	52	45 w/ cover letter

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
			Porteous. Memo discusses bond reductions and splitting of bonds. - 10/21/94 – Intelligence Report – name redacted – C.I. #420 - -10/24/94 – Redacted – Intelligence Report - 10/26/94 – Redacted – Intelligence Report – - 10/26/94 – Redacted – Intelligence Report – CI #4245 - 10/27/94 – Redacted Intel Report - 10/28/94 – Redacted Intel Report - 10/21/94 – Redacted Intel Report; - 10/12/94 – Redacted Intel Report; - 10/5/94 – Redacted Investigation Report; - 10/7/94 – Redacted Investigative Report - 11/17/94 – Redacted Investigative Report - 11/17/94 – Redacted Investigative Report – requested transcript of 9/24/94 hearing; - 11/21/94 – Redacted Investigative Report – - 11/21/94 – Redacted Investigative Report - 11/29/94 – Redacted Investigative Report		
69d	PORT00000751-PORT00000761	Department of Justice Document Production Four (excerpts) July 20, 2009	Cover letter – In response to 10 questions: - 11/9/94 – MEMO – Source advised of	163	114 w/ cover letter

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
		163 pages	documentation of JPSO on at least two occasions Porteous reduced/split bonds (REDACTED BLACK) - 10/26/94 – Interviewed __ redacted material re: Wallace, Marcotte and Porteous(redacted by DOJ and then has black redaction all over interview notes) - 302 12/12/03 – Jeffrey Duhon – (BLACK & WHITE redactions) – 5 pages are blank - 7/22/02 – 302 Jeffery Duhon – WHITE REDACTIONS - 1/29/04 – 302 Jeffery Duhon – WHITE REDACTIONS - 8/5/03 – 302 Jeff Duhon – WHITE REDACTIONS - 11/13/02 – 302 Jeff Duhon – WHITE REDACTIONS - 12/16/2002 – 302 Jeff Duhon – BLACK &WHITE REDACTIONS - 7/24/02 – 302 Jeff Duhon - WHITE REDACTION - 10/1/04 – 302 Aubrey Wallace – BLACK & WHITE REDACTION - 2/25/04 – 302 Loretta Young- Williams – VP Regions Bank – BLACK & WHITE REDACTION		
69e	PORT00000773-PORT00000804	Department of Justice Document Production Five (excerpts) October	- Cover letter, cover page and description of deletion codes – 3 pgs	22	6 w/ cover letter

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
		23, 2009 **22 pages**	- 10/2994 – FBI 302 redacted name of individual – 2 pgs -		
69f		Department of Justice Document Production Six (excerpts) November 13, 2009 **33 pages**	32 pages of records from the "Wrinkled Robe" investigation pertaining to Porteous: - 8/27/01 Affidavit supporting an application for an order authorizing Title III electronic surveillance or various telephone lines	33	33
69g		Excerpts from Norman Stotts - FBI Interview 12/18/02	Redacted with white – Most of the document is redacted – DOJ redaction	7	7
69h	1-3	Kevin Centanni - FBI Interview 7/7/04	Black redaction	3	3
72a	Pp 1, 5-6 JC202737, JC202741-JC202742	Excerpts from Louis Marcotte – FBI Interview March 2, 23, 24, 25 and 29, 2004	Black redaction – Information re: Porteous redacted.	3	3
72b	Pp 1-6 JC202818-202823	Louis Marcotte – FBI Interview 4/21/04	Black redaction – Portions of Porteous information redacted	6	6
72c	P 1 JC202695	Louis Marcotte – FBI Interview 4/23/04	No redactions	1	1
72c	Pp 1-10 JC202694-202693	Louis Marcotte – FBI Interview 4/1/04	Black redaction – Information relating to Porteous redacted	10	10
72e	Pp 1-3 JC202769-202771	Louis Marcotte – FBI Interview 4/6/04	Black redaction – redactions relating to Porteous information	3	3
72f		Louis Marcotte – FBI Interview 7/20/04	Black redaction – Re: Wallace & Duhon	2	2
72g		Louis Marcotte – FBI Interview 10/14/04	Black redaction – Most of the document is redacted	2	2
74a	P 1 JC202694	Lori Marcotte – FBI Interview 3/3/04	Black redaction – one Judge's name	1	1
74b	pp 1-3 JC202676-202678	Lori Marcotte – FBI Interview 3/25/04	Black redaction -	3	3

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
74c	Pp 1-9 JC202676-202793	Lori Marcotte – FBI Interview 3/30/04	Black redaction – information regarding Porteous	9	9
74d	Pp 1-5 JC202679-202683	Lori Marcotte – FBI Interview 4/20/04	Black redaction	5	5
74e	Pp 1-2 JC202701-202702	Lori Marcotte – FBI Interview 11/3/04	Black redaction	2	2
74f	P 1 JC202667	Lori Marcotte – FBI Interview 4/5/04	Black redaction	1	1
80a	1-2	Jeffery Duhon – FBI Interview 7/22/02	White redactions – DOJ	2	2
80b	1	Jeffery Duhon – FBI Interview 7/24/02	White redactions – DOJ	1	1
80c	1	Jeffery Duhon – FBI Interview 12/16/02	White redaction – DOJ	1	1
80d	1	Jeffery Duhon – FBI Interview 12/16/02	White redaction – DOJ	1	1
80e	1	Jeffery Duhon – FBI Interview 8/5/03	White redaction – DOJ	1	1
80f	1-5	Jeffery Duhon – FBI Interview 12/12/03	White redaction – DOJ	5	5
80g	1-3	Jeffery Duhon – FBI Interview	White redaction – DOJ	3	3
84	Pp 1-5 &FBI delete codes	Aubrey Wallace – FBI Interview 10/1/04	White redactions – DOJ	7	7
85	MCC0026-0026, MCC0199-0200	Documents from the Metropolitan Crime Commission	Black redaction	6	6

Congress of the United States
Washington, DC 20515

May 11, 2010

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous - Discovery

Dear Mr. Westling,

This letter responds to your letter of May 6, 2010.

As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

Paragraph 1. You are correct that some of the exhibits are excerpts from larger document collections. In the spirit of cooperation and in order to expedite the trial preparation process, we will make the entire document collections from which these records were selected available for inspection and copying, if you so desire.

Paragraph 2. As you have noted, certain of the exhibits have been redacted by the House and the Department of Justice (DOJ). You are free to inspect unredacted versions of the documents that the House redacted.

It is apparent that the bulk of the DOJ redactions – over which the House had no control – consisted of deleting identifying information as to witnesses, sources, and other materials that relate to persons other than Judge Porteous. There is nothing in the context of those documents that suggests that any redacted materials would be relevant to Judge Porteous's defense. In any event, the House has not had access to and will not use unredacted versions of these documents. Thus, the House cannot accommodate your request in this regard.

Exhibit 2

Paragraph 3. You have asked for "all of the materials the Committee reviewed as part of the investigation." This request is beyond the legitimate scope of discovery. Even a defendant in a criminal case where liberty is at stake is not entitled to replicate the investigation. Accordingly, we decline to produce materials responsive to this request.

In response to your request for information concerning depositions and other witness materials, we represent that all depositions have been produced. We decline to identify the names and identities of every person the House spoke to, where those individuals did not provide exculpatory information and will not be witnesses in this case. As stated previously, Judge Porteous is not entitled to replicate the House investigation.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or, Harold Damelin, 202-226-0144, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

In The Senate of the United States

Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

RESPONSE BY THE HOUSE OF REPRESENTATIVES
TO MOTION OF JUDGE G. THOMAS PORTEOUS, JR.
FOR DISCOVERY FROM THE HOUSE MANAGERS

The House of Representatives ("House"), through its Managers and counsel, respectfully responds to the Motion of Judge G. Thomas Porteous, Jr. for Discovery from the House Managers. First, it should be noted that the House has already produced, or is in the process of producing, all documents in its possession that it has identified as responsive to Judge Porteous's Discovery Requests 4, 5, and 6 – which includes all materials to be used at trial. Further, the House on its own initiative and prior to its receipt of Judge Porteous's discovery motion, has attempted to provide, and shall continue to provide, evidentiary materials in its possession that are not likely to be used at trial but are nevertheless sought by Judge Porteous's Discovery Request 1 (such as financial records and certain witness statements that were not marked as trial exhibits). That Request, however, is so broad and burdensome – seeking in substance that the House make available to Judge Porteous all information and all materials from all sources (regardless of their relevance to the Articles and without reference to the contents of the materials being sought) – that the House objects to that Request as drafted. The House also objects to

Judge Porteous's Motion to the extent it seeks access to attorney work product of Impeachment Task Force legal staff, including Judge Porteous's request for a list of all witnesses interviewed by the Task Force (Discovery Request 2) and all memoranda or notes taken at any witness interview (Discovery Request 3).

In support of this response, the House states as follows:

I. FACTUAL BACKGROUND

The procedural record is clear: 1) the House has already provided all materials that it presently intends to use at trial and is promptly making further production as additional materials, if any, are identified; and 2) to date, counsel for Judge Porteous has reviewed additional documents at the House's offices on three separate occasions. As to this latter category, when counsel has requested copies of any documents reviewed, the House has complied promptly. Thus, the House has taken a broad view of discovery early on in this case precisely to avoid discovery disputes and ensure an expeditious trial.

The chronology of these disclosures – obscured in Judge Porteous's motion – is as follows:

1. The House made a near-complete disclosure of trial exhibits and trial witness statements to Judge Porteous on March 23, 2010, when it provided a disc of exhibits and accompanying exhibit list setting forth the evidence the House anticipates using at trial. That disc and exhibit list included deposition testimony and other witness statements of individuals who have been deposed or interviewed about the facts surrounding the Articles of Impeachment. As Judge

Porteous notes, the materials amounted to approximately 9,700 pages. The House has not been tight-fisted about discovery. At the time of the March 23 production, the House also informed counsel for Judge Porteous that it had other materials available for inspection and copying that were not included as exhibits.

2. Specifically, the House made some of these additional materials (approximately two file drawers) available for inspection by Judge Porteous's counsel on April 9, 2010. That event is not mentioned in Judge Porteous's pleading. The documents included numerous financial records of Judge Porteous and of certain other witnesses. Counsel made no requests for copies of documents from that April 9 review.

3. By letter dated May 6, 2010, Judge Porteous requested that the House make certain exhibits available in unredacted form. The exhibits requested by Judge Porteous were all contained in the House's March 23 production with redactions either made by the House or by the Department of Justice prior to transmitting relevant documents to the House.[1] The House assembled the unredacted documents and responded to Judge Porteous in a letter dated May 14, stating that the documents were available for review.[2] Counsel reviewed the documents on

[1]As an example, the House had redacted materials to delete certain references to third parties, such as other state judges, where the conduct of those judges did not result in prosecutions and the information is not relevant to the Articles of Impeachment.

[2]The House explained to Judge Porteous's counsel that it only had the ability to remove the redactions that it had made, and it could not unredact any of the redactions made by the Department of Justice.

May 20 and requested a complete set. On May 21, 2010, the House provided a complete set of the unredacted materials that had been reviewed by Judge Porteous's counsel the day before.

4. On May 21, 2010, the House also provided Judge Porteous with an updated exhibit list and an updated disc of exhibits, which included a small number of additional documents that were not contained in the March 23, 2010 production.[3]

5. On May 26, 2010, the House made additional materials (approximately a little more than a box of materials) available for inspection by Judge Porteous's counsel. The documents consisted generally of additional financial records for Judge Porteous and certain other witnesses. After that review, Judge Porteous's counsel informed House staff counsel that they would likely request copies of certain of those documents, but no specific request has yet been received.[4]

Thus, the House has strived, and shall continue to strive on an ongoing basis, to be as open as possible with Judge Porteous in providing him with relevant evidentiary materials in its possession.

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[3]It is inevitable in any litigation that an exhibit list will undergo changes over time, as exhibits are added, deleted, or edited as the case moves closer to trial. For example, the House is likely to use summary charts or time-lines that are based on the exhibits that have already been identified and produced. When such documents are prepared they will be added to the exhibit list and provided to counsel for Judge Porteous.

[4]As Judge Porteous has noted, the House has identified some additional materials that it will soon make available for inspection and copying and has so informed counsel for Judge Porteous.

II. JUDGE PORTEOUS'S DISCUSSION OF THE PROCEDURAL BACKGROUND

In the "Introduction and Procedural Background" section of his discovery motion, Judge Porteous alludes to a variety of factual circumstances in an attempt to paint a picture suggesting that he has been kept in the dark about the evidence in this case, and to suggest a backdrop against which his discovery requests should be considered. An accurate consideration of the procedural background, however, compels precisely the opposite conclusion and demonstrates that Judge Porteous has been provided virtually complete information as to the evidentiary details of the House's case.

For example, Judge Porteous notes that there was no prior criminal trial where discovery would have been provided. This ignores the fact that there was a full-blown adversary hearing in the Fifth Circuit, at which ample discovery was provided by investigatory counsel, and at which Judge Porteous heard the witnesses testify and cross-examined them under oath. Judge Porteous also complains that he received discovery in the nature of witness statements from only a "handful" of witnesses who testified during the Impeachment Task Force hearings, yet it is essentially this same "handful" of witnesses who will testify at the Impeachment trial. Moreover, with the exception of the House having obtained court records of curatorships assigned by Judge Porteous to Robert Creely, and the transcript of the October 16, 1996 recusal hearing in the Liljeberg case, the documentary evidence relating to Articles I (the Liljeberg case) and III (Judge Porteous's bankruptcy) is largely unchanged.

Further, the House Impeachment Task Force held public hearings where the critical "handful" of witnesses testified and where Judge Porteous's current counsel had the opportunity

to examine them. Judge Porteous attempts to minimize this event by claiming that his counsel was limited in his ability to cross-examine the witnesses at those hearings. That contention entirely obscures the facts that: 1) the House Impeachment Task Force provided counsel the extraordinary courtesy of permitting him to participate and examine witnesses at a House proceeding; 2) prior to those hearings, the House provided Judge Porteous's counsel with the Impeachment Task Force depositions of the witnesses who would be testifying, 3) though the House operated on a "five minute rule" for Members, Mr. Westling was initially provided ten minutes, and whenever he sought additional time – which he did on two occasions – such time was granted to him by Task Force Chairman Adam Schiff without any time limitation,[5] and 4) Judge Porteous now has personally heard the witness testimony under oath of virtually all the essential witnesses and has a transcript for use at the Impeachment trial.

Finally, the House, by virtue of the highly detailed and documented Impeachment Report, has provided Judge Porteous with what can only be described as a witness-by-witness, document-by-document preview of the House's case.

Thus, in light of the Fifth Circuit proceedings, the Impeachment Task Force hearings, the detailed Impeachment Report, and the extensive document productions made to date, Judge

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[5]See *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part I), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary*, Ser. No. 111-43, Nov. 18, 2009, 111th Cong., 1st Sess., 189 (Mr. Westling: "Mr. Chairman, I am noticing my light is on. Could I have a few more moments?" Mr. Schiff: "Yes, of course, Counsel."); *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part IV), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary*, Ser. No. 111-46, Dec. 15, 2009, 111th Cong., 1st Sess., 51 (Mr. Westling: "Mr. Chairman, I note my light is on. May I proceed." Mr. Schiff: "Of course.").

Porteous's contention that he is in some way uninformed of the factual nature and evidentiary detail of the House's case is simply meritless.

III. GENERAL PRINCIPLES

In its May 11, 2010 letter to counsel for Judge Porteous, the House stated its position clearly. It agreed to produce: "1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence." Additionally, in that same letter, the House made clear, as it reiterates in this Response, that it would not construe its discovery obligations narrowly: "The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process."

The House is aware of the Senate Impeachment Trial Committee's "Disposition of Pretrial Issues" in the Hastings Impeachment proceedings in which the Senate Impeachment Trial Committee urged the House to make "the fullest disclosure possible."[6] As described above, the House has done, and will continue to do, just that.

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[6]See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 9, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101-194, Pt. 1, 101st Cong., 1st Sess. at 289

IV. JUDGE PORTEOUS'S SPECIFIC REQUESTS

Judge Porteous, though having broken up his requests into 7 categories, seeks nothing less than all "information" that has been provided to the House from all sources, whether or not that information has any conceivable relevance to the Articles actually filed, and includes what would be work-product of House counsel. The framing of the discovery requests truly misconstrues the purpose of discovery – to make Judge Porteous aware of the evidence the House will use against him – and instead seems to be premised on the principle that Judge Porteous is entitled to duplicate the House's investigation. Specifically, Judge Porteous is not entitled to know every individual with whom Task Force staff has spoken (Discovery Request 2), nor is he entitled to access to staff work product (Discovery Request 3).[7]

Thus, as described above, with regard to Judge Porteous's other discovery Requests, the House has already produced, or is in the process of promptly producing, documents responsive to Request 5 (evidence the House intends to introduce at trial), Request 4 (records relating to criminal convictions of potential witnesses to the extent any such responsive documents exist and have been identified), Request 6 (exculpatory materials), as well as documents generally responsive to Request 1 (various categories of documents gathered by the Impeachment Task Force related to this Impeachment).

(1989).

[7]To the extent Judge Porteous's Discovery Request 3 seeks any notes or memoranda by FBI Special Agent DeWayne Horner, no such documents exist. At no time during any witness interviews attended by Agent Horner did he take notes.

V. CONCLUSION

Judge Porteous's pleading sets forth a procedural history that is simply belied by the facts of Judge Porteous's in depth involvement and knowledge of the facts and evidence that relate to his conduct. The House on its own initiative, prior to any requests by Judge Porteous or the issuance of a discovery schedule by the Senate Trial Committee, has undertaken substantial efforts to ensure that Judge Porteous receives all materials that relate to the House's presentation of evidence in this case and materials that would be exculpatory, and it shall continue to do so.

WHEREFORE, the House requests that the Senate Impeachment Trial Committee deny Judge Porteous's Motion to the extent it seeks the production of attorney work product materials, including the production of a list of all witnesses interviewed by Task Force staff (Request 2) and attorney notes or memoranda taken during witness interviews (Request 3). The House further requests that the Senate Impeachment Trial Committee deny Request 1 as overbroad and burdensome. The House will continue to provide discovery consistent with its positions stated in this pleading and in correspondence with counsel (generally tracking Judge Porteous's Requests 4, 5 and 6), and will continue to construe its obligations expansively.[8]

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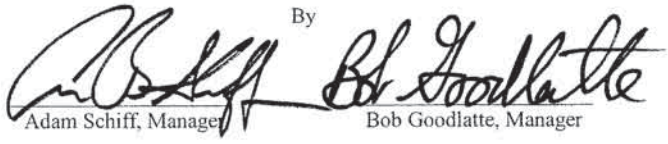
[8]The House will endeavor to cooperate with any principles of discovery the Committee states. As a matter of comity, the Committee should avoid issuing an "Order" to the House – a coordinate branch of Congress. In the Hastings case, the Senate in its "Disposition of Pretrial Matters," opted to state principles rather than seek to direct the House, and we urge that process here as well.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By



Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

June 4, 2010

In The Senate of the United States

Sitting as a Court of Impeachment

—

IN RE: IMPEACHMENT OF G. THOMAS PORTEOUS, JR.,
UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA

—

MOTION OF THE HOUSE OF REPRESENTATIVES FOR RECIPROCAL DISCOVERY

The House of Representatives ("House"), through its Managers and counsel, respectfully moves the Senate Impeachment Trial Committee to direct Judge Porteous to provide reciprocal discovery to the House. In support of this request, the House respectfully submits:

The House has taken upon itself the ongoing obligation to provide the following materials to Judge Porteous: "1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence."[1] To facilitate the trial preparation process, the House has in fact provided materials above and beyond the above-listed categories. As examples, it has made available large collections of financial records relating to both Judge Porteous and other witnesses, from which only a few pages were identified as potential trial exhibits, as

[1] See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., March 23, 2010 (providing initial discovery) (attached to this pleading as "Attachment 1"); Letter from Alan I. Baron, Esq. to Richard Westling, Esq., May 11, 2010 (setting forth discovery principles) ("Attachment 2").

well as testimony of numerous individuals who are unlikely to be called as witnesses at trial.

Moreover, the House, by way of the Report accompanying the Articles of Impeachment, has provided Judge Porteous with a detailed description of the essential features of the witness testimony that will be elicited in its case.[2] Indeed, Judge Porteous is personally knowledgeable of the testimony of many of the witnesses who are likely to be called at trial by virtue of their appearances before the Fifth Circuit Committee and/or at the Hearings before the House Impeachment Task Force. The Report also identifies specific documents that are likely to be used by the House to support the various Articles of Impeachment. Finally, the House, in its reply to a request by Senate Legal Counsel, has set forth its initial witness list.[3]

The House, by way of a letter to counsel for Judge Porteous, has requested "reciprocal" discovery that tracks the first three categories of materials that the House has already provided to Judge Porteous. Specifically, in a May 13, 2010 letter, the House requested that Judge Porteous provide: "1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial."[4] Judge Porteous has not responded to this

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[2]See H.R. REP. NO. 111-427, *Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, Report of the Committee on the Judiciary to Accompany H. Res. 1031*, 111th Cong. 2d Sess (2010).

[3]See Letter from Reps. Adam Schiff and Bob Goodlatte to Sens. Claire McCaskill and Orrin Hatch, Apr. 13, 2010 ("Attachment 3").

[4]See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., May 13, 2010 (regarding discovery) ("Attachment 4").

letter (nor did he provide a witness list in his response to the initial inquiries of the Senate Legal Counsel).

We urge that the Senate Impeachment Trial Committee direct Judge Porteous to provide the requested materials to the House. Such disclosures will not only enhance the truth-seeking process so that the Senate may appropriately consider the evidence, but it will ensure that the trial proceeds without unnecessary delay or interruption. Such a direction would be consistent with the Senate's disposition of the House's request for reciprocal discovery in the Hastings impeachment proceeding.[5]

WHEREFORE, the House requests that the Senate Impeachment Trial Committee order Judge Porteous to provide to the House: 1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial.

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[5]See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 9, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101-194, Pt. 1, 101st Cong., 1st Sess. at 289 (1989) ("Attachment 5"), where the Senate Impeachment Trial Committeee ruled: "Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements, of witnesses that Judge Hastings intends to call."

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

May 28, 2010

Attachment 1

Congress of the United States

Washington, DC 20515

March 23, 2010

Via Hand Delivery
Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous –
Exhibit List and Exhibits

Dear Mr. Westling,

We look forward to working cooperatively with you to ensure that that the proceedings in the Senate may proceed expeditiously and without unnecessary delay. To that end, this is the first of what is likely to be several letters we will be sending you to address the trial preparation process.

Enclosed please find an Exhibit List that lists the documents (including transcripts and other materials) cited in the Committee Report as well as other exhibits that have been marked in anticipation of their potential use at trial. Also, please find a disc that contains electronic copies of all of the exhibits on the list. If additional exhibits are identified for use at trial, we will mark them and provide you copies.

The exhibits on the disc have been redacted to delete reference to personal identifying information (such as social security numbers) and, in some instances, to delete references to third parties. We will make available for your inspection the original unredacted materials at your request.

In addition, the House, through the Committee on the Judiciary's Impeachment Task Force, has obtained materials that were not marked as exhibits and have not been not copied. These generally include:

- Financial records, such as Judge Porteous's personal bank records, IRA records, various credit card records, and certain gaming records, of Judge Porteous. These records were originally obtained by the Department of Justice, and the Task Force obtained them either from the Fifth Circuit or from the Department of Justice.

- Financial records, such as credit card statements and business records, for some of the witnesses. These were originally obtained by the Department of Justice.

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- Other materials obtained from the Fifth Circuit or third parties.

It appears that the bulk of these records were made available to Judge Porteous in connection with the Fifth Circuit proceedings.

These materials are available for your inspection and copying upon your request. If you wish to review these materials, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144, to arrange a time to review them.

Sincerely,

Alan Baron

Alan I. Baron
Special Impeachment Counsel

Enclosures

Attachment 2

Congress of the United States
Washington, DC 20515

May 11, 2010

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous - Discovery

Dear Mr. Westling,

This letter responds to your letter of May 6, 2010.

As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

Paragraph 1. You are correct that some of the exhibits are excerpts from larger document collections. In the spirit of cooperation and in order to expedite the trial preparation process, we will make the entire document collections from which these records were selected available for inspection and copying, if you so desire.

Paragraph 2. As you have noted, certain of the exhibits have been redacted by the House and the Department of Justice (DOJ). You are free to inspect unredacted versions of the documents that the House redacted.

It is apparent that the bulk of the DOJ redactions – over which the House had no control – consisted of deleting identifying information as to witnesses, sources, and other materials that relate to persons other than Judge Porteous. There is nothing in the context of those documents that suggests that any redacted materials would be relevant to Judge Porteous's defense. In any event, the House has not had access to and will not use unredacted versions of these documents. Thus, the House cannot accommodate your request in this regard.

Paragraph 3. You have asked for "all of the materials the Committee reviewed as part of the investigation." This request is beyond the legitimate scope of discovery. Even a defendant in a criminal case where liberty is at stake is not entitled to replicate the investigation. Accordingly, we decline to produce materials responsive to this request.

In response to your request for information concerning depositions and other witness materials, we represent that all depositions have been produced. We decline to identify the names and identities of every person the House spoke to, where those individuals did not provide exculpatory information and will not be witnesses in this case. As stated previously, Judge Porteous is not entitled to replicate the House investigation.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or, Harold Damelin, 202-226-0144, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

Attachment 3

Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

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[1]"Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

Attachment 4

Congress of the United States
Washington, DC 20515

May 13, 2010

By Electronic and Regular Mail

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous—
Initial Discovery Request

Dear Mr. Westling:

The purpose of this letter is to request certain discovery from Judge Porteous.

The House formally requests that Judge Porteous provide discovery of the following materials: 1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial. These categories correspond to the categories of materials that the House has stated it will produce to Judge Porteous.

If you have questions, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144.

Sincerely,

Alan Baron

Alan I. Baron
Special Impeachment Counsel

Attachment 5

United States Senate
WASHINGTON, DC 20510
IMPEACHMENT TRIAL COMMITTEE

DISPOSITION OF PRETRIAL ISSUES

Upon consideration of the written submissions of the parties on pretrial issues and the oral argument on April 12, 1989, the committee has authorized the chair to issue the following rulings on behalf of the committee:

Preliminary Witness Lists

First, on three occasions, beginning on August 10, 1988, the Committee on Rules and Administration asked the parties for preliminary lists of witnesses with a description of the general nature of the testimony that is expected from each witness. The Rules Committee expressly stated that neither side would be precluded, by the submission of this preliminary information, from requesting subpoenas for other witnesses. On September 6, 1988, the House submitted a list of twenty-three witnesses that it anticipates calling. The House briefly described the nature of each witness's proposed testimony. On January 17, 1989, the House supplemented that list with six additional witnesses. Judge Hastings did not provide to the Rules Committee a list of his proposed witnesses in these Senate proceedings. Neither has Judge Hastings provided to this committee a preliminary list of the witnesses that he intends to call before us, other than to refer to material which he had provided last year to a subcommittee of the House Committee on the Judiciary.

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It is imperative that Judge Hastings now provide his preliminary witness list without any further delay. The committee requires the list in order to complete its consideration of pretrial issues, including the fixing of an appropriate date to begin evidentiary hearings. Accordingly, Judge Hastings is directed to provide to the committee by noon on April 19, 1989, a preliminary witness list that identifies in good faith the witnesses that he intends to call before this committee. The witness list should also briefly state, in detail comparable to that already provided by the House for its anticipated witnesses, the nature of the testimony that Judge Hastings expects each listed witness would provide. This is to be a preliminary list. Judge Hastings may add, by showing good cause for not including them on the preliminary list, additional names when he submits his final witness list. In the absence of a showing of good cause, the committee may exclude the testimony of any witness who is not listed and described in the preliminary witness list.

The House has indicated that it may have additional witnesses. To the extent that those additional witnesses are now known to the House, the House should supplement its preliminary list by noon on April 19, 1989.

Motion In Limine

Second, the House has moved in limine to exclude five categories of evidence as irrelevant.

The first category concerns the motivations of persons who investigated Judge Hastings in 1981 and then who prosecuted him in United States v. Hastings, Cr. No. 81-596-Cr-ETG. The third category concerns the motivations of persons who investigated the matters addressed by Grand Jury No. 86-3 (Miami) concerning the alleged disclosure by Judge Hastings of confidential wiretap information.

Judge Hastings correctly notes that the House has placed on its witness list several assistant United States attorneys and agents of the Federal Bureau of Investigation who would testify in connection with either the bribery and perjury allegations or the wiretap matter. Judge Hastings asserts that the House motion is premature. He also asserts that he should be able to inquire into the motivation and bias of the witnesses against him. As Judge Hastings has asserted a tenable basis for some degree of latitude in cross-examining the witnesses that the House will call, the committee denies at this time this portion of the House's motion. To the extent that Judge Hastings proposes to inquire into the motivations of persons who investigated and prosecuted him for a purpose other than impeaching witnesses that the House will call, the House motion is premature in

the absence of a firm indication from Judge Hastings, through the filing of a witness list, that he intends to call any such witnesses. We wish to make clear nonetheless that our denial at this time of this portion of the House motion should not be understood to invite an open-ended inquiry into the motivations of federal prosecutors and investigators. Rather, any such inquiry must be limited to evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Hastings' guilt or innocence.

Categories two and four concern the motivations of persons who initiated, investigated, and considered the complaints that were filed against Judge Hastings in March, 1983, and September, 1986, with the Eleventh Circuit under the Judicial Conduct and Disability Act of 1980. Judge Hastings contends that this aspect of the House motion also is premature.

The issues that are presented by the articles concern Judge Hastings' conduct, not the conduct of members of the judicial branch or persons employed by it. Judge Hastings has made no showing that evidence in categories two and four would be relevant to the articles of impeachment. Moreover, a grant of the House motion with respect to categories two and four should help to focus the parties' preparation for trial on issues that will be germane to the Senate's consideration of the articles. The motion to exclude

evidence of the matters described in categories two and four is granted.

The fifth category in the House motion in limine is cumulative evidence on Judge Hastings' general character and reputation. We agree with Judge Hastings that this portion of the House motion in limine is premature. We expect that Judge Hastings will be mindful of the limitations that the committee placed on the number of character witnesses, and the total length of character testimony, in the Claiborne proceedings, and that, in composing his witness list, Judge Hastings will recognize the need to avoid cumulative evidence. We can address at a later date any question which arises about the need to impose limits on that testimony.

Documentary Discovery

Third, Judge Hastings has moved for extensive pretrial discovery. He advocates that discovery be based on contemporary ideas about discovery in federal civil judicial proceedings. The House has proposed a scope of discovery that is modeled to a greater extent on federal criminal judicial proceedings. The House proposes to provide to Judge Hastings any exculpatory evidence that it possesses. The House also proposes that each party provide to the other party the documents that it proposes to offer in evidence, prior sworn, adopted, or approved statements of witnesses that each proposes to call, and substantially verbatim and

contemporaneously recorded statements of witnesses that each intends to call. The discovery proposed by the House should be completed as promptly as possible. We reject, however, the divergent theoretical limits -- expansive in Judge Hastings' view and constricted in the House's view -- that each side has advocated.

The House has expressed a concern about one House of Congress directing another House to produce records. We need not address at this time whether the Senate has that power in an impeachment proceeding, because we think that it should be sufficient to state principles and a schedule to guide these proceedings:

(a) To the extent that the parties have had a disagreement about photocopying, we recommend to the House that the issue be resolved in Judge Hastings' favor and that the House provide to Judge Hastings copies of all documents that the House has no objection to providing on the basis of their content. To facilitate Judge Hastings' response to the House's proposed stipulations, a matter that will be discussed below, the House should provide those copies by April 21, 1989, a week from today's order.

(b) The House -- which has proposed to provide exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence that it intends to introduce in evidence -- has indicated that it has provided

most but not all of that material to Judge Hastings. The House would like to defer further production until it receives equivalent material from Judge Hastings. We will be requiring comparable disclosure by Judge Hastings, but the production to Judge Hastings should not be delayed while that occurs. Again, because we will be requiring responses to the House's proposed stipulations, the House should provide this material to Judge Hastings by April 21.

(c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House -- for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings -- to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to

Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them. Again, because of the schedule that will be set forth below for responses to stipulations, the House should respond by May 3.

(d) Judge Hastings also has a burden that he has not yet met. It will be necessary for him to do more than simply demand everything that other people have. In order to facilitate the process that we are asking the House and the other branches to undertake, Judge Hastings should identify, with far greater particularity than he has to date, the records that are germane to issues in these proceedings. Also, if it would be of assistance to the holders of documents in determining their responses, he should articulate to them the basis for his requests. To enable the House to respond by May 3, Judge Hastings should submit his particularized requests by April 26.

(e) Neither the Department of Justice nor the counsel or the members of the Investigating Committee of the Judicial Council of the Eleventh Circuit are before us. If Judge Hastings has requests for documents from either the Department, including the Federal Bureau of Investigations, or the Judicial Council, he should promptly make particularized requests to them by April 26. With knowledge of the committee's interest in the fullest disclosure possible, we would appreciate knowing of the Department's and the Council's responses at the earliest possible time.

(f) Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements of witnesses that Judge Hastings intends to call.

Depositions

Fourth, Judge Hastings has asked that the Senate utilize its subpoena power to enable him to take depositions in advance of the committee's hearings. He has attached to his most recent request a list, which he has denominated a provisional list, of twenty-four Department of Justice attorneys and Federal Bureau of Investigation officials and agents. The list is taken from a list of provisional witnesses that Judge Hastings had submitted last year to a subcommittee of the House Committee on the Judiciary.

The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial. Nevertheless, the committee will give further consideration to Judge Hastings' request for depositions after receiving from him a statement that includes the following information: a list of proposed deponents; a proffer of the testimony he expects to elicit from each proposed deponent and the relevance of that testimony; whether the proposed deponent has testified or provided statements in prior proceedings and whether Judge Hastings has received or has had access to any transcripts or recorded statements; whether Judge Hastings has asked the proposed deponent to provide information voluntarily and, if he has, the response of the proposed deponent; and, if the committee provides for depositions but limits their number, what priorities Judge Hastings places among the depositions that he is requesting.

If Judge Hastings wishes to pursue his request for depositions, he should submit this statement by April 28, 1989.

It is the committee's hope and expectation that if either the House or Judge Hastings seeks an opportunity to obtain information from the Department of Justice, including the Federal Bureau of Information, that the Department and the Bureau will cooperate voluntarily to provide relevant information.

Stipulations

Fifth, the House, on December 15, 1988, served an original and, on March 31, 1989, served a revised proposed stipulation of facts. The revised proposal reorganizes the original proposed stipulation of facts into fifteen categories. The House also served on December 15, 1988, a proposed stipulation of documents which asked that the parties stipulate that each of the listed documents is genuine. The proposed documentary stipulation also proposed other stipulations for designated categories of documents. The December 15, 1988 submission by the House on documentary stipulations stated the proposed stipulations did not preclude pertinent objections to the admissibility of the documents listed by the House based on matters not addressed in the stipulations.

On January 17, 1989, the House proposed that the Senate adopt a rule that any proposed stipulation of fact will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. The House asked for a parallel rule on the authenticity of documents.

An early resolution of factual questions and questions about the authenticity and admissibility of documents that are not in dispute will enable the parties and the committee to focus their time and energies on matters that are truly in

disagreement. Also, the committee has been directed by the Senate to report to it on facts that are uncontested.

Accordingly, the committee accepts the House proposals. We direct Judge Hastings to respond to the House's proposed revised stipulations of fact, filed on March 31, 1989, by admitting their truth or serving and filing a specific objection that includes a proffer as to why the proposed stipulation should not be taken as true. With respect to documents, we direct Judge Hastings to respond to the House's proposed documentary stipulations, filed December 15, 1988, by admitting the matters set forth in that submission and by admitting the admissibility of the documents listed by the House, or by serving and filing a specific objection that includes a proffer as to why the proposed stipulation concerning each document should not be taken as true and the particular document admitted into evidence.

Judge Hastings has had nearly four months to evaluate the House's proposed stipulations. We direct that Judge Hastings' response be submitted no later than May 10, 1989. This should be a reciprocal process. Although Judge Hastings' has not proposed stipulations of his own, he may do so by May 10. If Judge Hastings does submit proposed stipulations by that day, the House should respond to them by May 24. The parties should engage in this process with an

eye towards resolving problems. Consequently, if a disagreement about a proposed stipulation can be resolved by redrafting the stipulation to be more accurate, or can be resolved by providing access to a specific document, then we would expect the parties to work together to settle differences between them.

Evidentiary Principles

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

Final Pretrial Statements

Lastly, the parties should file final pretrial statements by a date that the committee will designate when it issues an order setting a date for the commencement of testimony. These statements should include a final list of

witnesses with a brief statement of the nature of each witness's proposed testimony. The parties should also submit marked exhibits that each proposes to offer. Further, each party should set forth to the committee the legal principles that each believes is applicable to each article of impeachment, or, if appropriately grouped, set of articles. Although the committee will not reach conclusions of law, it is important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. We will provide more detailed instructions to the parties about the contents of these pretrial statements.

Deferred Matters

The committee is continuing to consider Judge Hastings' application for defense funds. The committee is also continuing to consider a schedule for its evidentiary hearings. The committee expects to issue an order or orders on these matters within a week.

Jeff Bingaman
Chairman

Dated: April 14, 1989

IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

RESPONSE OF JUDGE G. THOMAS PORTEOUS, JR. TO THE MOTION OF THE HOUSE MANAGERS MOTION FOR DISCOVERY

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and responds to the Motion of the House Managers for Discovery. In response Judge Porteous states as follows:

In their motion for discovery, the House Managers have requested that Judge Porteous provide them with: (1) any tangible evidence Judge Porteous intends to use at trial; (2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and (3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial.

Judge Porteous will provide the House Managers with the requested reciprocal discovery as it comes into his possession or is otherwise identified and provides the following specific responses to the motions numbered requests:

Request No. 1: Judge Porteous has not yet identified the tangible evidence he intends to use at trial, but will make the evidence available to the House Managers once it

has been identified. Currently, there is a substantial amount of discovery outstanding in this matter, making it difficult, if not impossible, for Judge Porteous to make evidence decisions at this point.

Request No. 2: Judge Porteous is not in possession of any sworn or adopted witness statements from any witnesses he may call at trial.

Request No. 3: Judge Porteous is not in possession of any transcripts or substantially verbatim statements of any witnesses he may call at trial.

Judge Porteous understands that the House Manager's request is a continuing one and will provide any responsive materials if they are developed or identified during trial preparation.

Respectfully submitted,

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United States District Judge for the Eastern District of Louisiana

Submitted: June 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

Alan Baron - abaron@seyfarth.com

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United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

DISPOSITION OF DISCOVERY ISSUES

The Committee has a duty to receive evidence and to report a statement of facts, both uncontested and contested, for consideration by the full Senate in exercising its sole power to try all impeachments. In order for the Committee to fulfill this duty, the parties must cooperate in sharing information and other tangible evidence that will be made part of the Senate record or appears likely to lead to new, relevant evidence for the Senate proceedings. The parties have agreed to work together in the exchange of information and have come to agreement on several of the original discovery requests identified in the parties' motions. The Committee encourages this cooperation.

The remaining disputes largely concern the scope of Judge Porteous's discovery requests for information beyond the four Articles of Impeachment adopted by the House and for information that is the work product doctrine of the House.

The Committee seeks a fair discovery process which balances the need for Judge Porteous to obtain relevant information necessary for his defense with the orderly resolution of the Articles. Expanding these discovery proceedings to information not reasonably related to the four Articles of Impeachment would cause unnecessary delay and complication of the issues before the Senate. Furthermore, the Committee finds no basis for allowing Judge Porteous broad access to the work product of the House. Therefore, it is the Committee's view that discovery should be limited to information relevant to the four Articles of Impeachment and not subject to a reasonable claim of work product protection by the House.

Upon consideration of the written submissions of the parties on discovery issues, the Committee issues the following rulings:

Judge Porteous has agreed to provide the House with all of the information requested by the House motion for reciprocal discovery. Accordingly, Judge Porteous should promptly provide the information requested by the House as it becomes available.

The House has agreed to provide Judge Porteous with some, but not all, of the information requested by Judge Porteous. In response to Request 1, the House should provide all information in its possession that is relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment. The Committee finds that Requests 2 and 3 would intrude into the work product of the House and concludes that disclosure is not justified at this time. With respect to Request 4, the House should provide Judge Porteous with all information relevant to and reflecting on the character, credibility, or believability of witnesses that the House intends to call at trial. The House has agreed to provide Judge Porteous with all information responsive to Requests 5 and 6 and should do so promptly. Lastly, the Committee finds that the House need not provide the index of information sought in Request 7.

The Committee encourages the parties to continue cooperation in discovery and other pretrial matters.

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

Dated: June 09, 2010

Congress of the United States
Washington, DC 20515

June 15, 2010

Via Electronic Mail and Hand Delivery

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Re: Impeachment of Judge G. Thomas Porteous – Discovery

Dear Counsel:

Enclosed please find an updated Exhibit List and corresponding disc of exhibits. We have added 12 new exhibits, identified below, and we have also amended HP Exhibit 79, to add the witness certification to the end of the deposition transcript of Charlie Kerner. Please note that several of these newly-marked exhibits are documents or materials that Judge Porteous has seen before.

- HP Exhibit 6(c): Judge G. Thomas Porteous Jr.'s Reply Memorandum to the Report by the Fifth Circuit Special Investigatory Committee
- HP Exhibit 19: 12/08/03 FBI Interview of Robert Creely
- HP Exhibit 42: 12/08/03 FBI Interview of Rhonda Danos
- HP Exhibit 48: FBI Surveillance Video Recording (Judge Porteous and others entering and leaving Emerils Restaurant on March 11, 2002)
- HP Exhibit 49:[1] FBI Wiretap Recordings (March 11, 2002 telephone calls by LouisMarcotte to Judge Porteous's chambers re: lunch at Emerils)
- HP Exhibit 89(a)-(d): FBI Interviews of Ronald Bodenheimer
- HP Exhibit 333(a)-(b): Interviews of William Greendyke
- HP Exhibit 343: Documents produced by Claude Lightfoot to Grand Jury

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[1] HP Exhibits 48 and 49 are enclosed on separate discs.

In addition, please be advised that upon a further review of documents and materials in the House's possession, the House has identified additional materials – approximately 3 redwelds and some electronic files of FBI spread sheets of financial records – for your inspection.

As we have indicated, we have taken an expansive view of our obligations, and these materials may exceed the requirements of the Special Impeachment Trial Committee's June 9, 2010 Disposition of Discovery Issues. In conjunction with the additional materials on the exhibit list, we believe that with the production of these materials for your inspection (and copying if you desire), we have satisfied our discovery obligations in this case. However, we recognize that discovery obligations are ongoing, and if we identify additional discoverable materials in our possession, we shall inform you promptly of that fact and either provide them to you or permit you to inspect them.

If you have any questions about the updated Exhibit List and disc of exhibits, or the House's document production, please contact Kirsten Konar at 202-828-3526.

Sincerely,

Alan I Baron

Alan I. Baron
Special Impeachment Counsel

Enclosures

cc: Derron Parks (via e-mail) (w/o enclosures)
Tom Jipping (via e-mail) (w/o enclosures)
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